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In the Supreme Court of the United States

OCTOBER TERM, 1968

AMERICO DI PIETTO, ERNEST INFELICE, JAMES MIRRO, FRANK SANTUCCI and ROBERT J. McDONNELL,
Petitioners,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

JOINT PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

EDWARD J. CALIHAN, JR.
JOHN P. CROWLEY
BAILEY & LE FEVOUR
53 W. Jackson Blvd.
Chicago, Illinois 60604
Attorneys for Petitioners

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To The Honorable The Chief Justice and Associate Justices of the Supreme Court of the United States:

The Petitioners, Americo Di Pietto, Ernest Infelice, James Mirro, Frank Santucci, Robert J. McDonnell, pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit affirming the judgment of conviction for conspiracy to violate Title 18, U.S.C. §2314, in the United States District Court for the Northern District of Illinois, Eastern Division.

OPINION BELOW

The opinion of the Court of Appeals is not yet officially reported. It is printed in the Appendix to this Petition. (App. A, p. App. 1).

JURISDICTION

Judgment of the Court of Appeals was entered on May 17, 1968 (App. B, p. App. 13). A timely petition for rehearing was denied on June 20, 1968 (App. C, p. App. 14). The jurisdiction of this Court is invoked under 28 U.S.C., §1254(1).

STATUTE INVOLVED

18 U.S.C. §2314:

> Whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud; or
>
> Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce any falsely made, forged, altered, or counterfeited securities, knowing the same to have been falsely made, forged, altered, or counterfeited; or
>
> Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce, any tool, implement, or thing used or fitted to be used in falsely making, forging, altering, or counterfeiting any security, or any part thereof—
>
> Shall be fined not more than $10,000 or imprisoned not more than ten years, or both.
>
> This section shall not apply to any falsely made, forged, altered, counterfeited or spurious representa-

tion of an obligation or other security of the United States, or of an obligation, bond, certificate, security, treasury note, bill, promise to pay or bank note issued by any foreign government or by a bank or corporation of any foreign country. June 25, 1948, c. 645, 62 Stat. 806, amended May 24, 1949, c. 139, §45, 63 Stat. 96.

QUESTIONS PRESENTED

1. Is the insertion of the payee and amount on an American Express money order validly signed by the payor a forgery so as to permit prosecution for conspiracy to transport falsely made, forged, altered or counterfeit securities in interstate commerce in violation of 18 U.S.C. §2314?

2. Do communications, concerning deliberations, between court attendants and the jury outside of the presence of the petitioners and their counsel require reversal when there has been no showing that the communications were not prejudicial?

3. Whether under the rule of this Court in *Bruton* v. *United States,* 88 S.Ct. 1620, repeated prejudicial and inflammatory comments and questions by the prosecutor can be cured by instructions to the jury to disregard.

STATEMENT OF THE CASE

These petitioners were indicted for conspiracy to transport falsely made, forged, altered or counterfeit securities in interstate commerce in violation of 18 U.S.C. §2314.

Viewed in a light most favorable to the Government, as it must be, *Glasser* v. *United States,* 315 U.S. 60, 80, the evidence established the following: In May of 1961 the petitioner Santucci stole 148 American Express money orders from a store where they were held for sale to customers. The money orders bore an imprinted signature on behalf of the American Express Company, and no additional signature was required on issuance. The words "not payable for more than one hundred dollars" were printed on them. The spaces for the amount, payee, date and sender's name and address were blank. The money orders were payable in New York. (App. D, p. App. 15).

On May 29th in Franklin Park, Illinois, the petitioners DiPietto and Infelice, after a meeting with the petitioner Santucci, arranged with the unindicted co-conspirator Ackerman to pass the money orders. The petitioners Santucci and Mirro were subsequently advised of this arrangement. (R. 36-51)[1] On June 1st, Ackerman asked the petitioner McDonnell for suggestions on the disposition of these money orders. The petitioner McDonnell then telephoned the unindicted co-conspirator O'Connor in Kansas City. O'Connor agreed to handle the money orders. (R. 47).

Ackerman delivered the money orders to O'Connor in St. Louis. O'Connor took them to Kansas City where he, unindicted co-conspirator Lent, and Lent's wife filled in about 85 of the money orders. Mrs. Lent filled in the sender's name as W. R. Stanley of Chicago and made them

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[1] References to (R.) are to the appendix prepared for the court below and certified to this court as the record in the cause pursuant to rule.

payable to Henry L. Stanley. Lent typed in the amount of $100 on each order while O'Connor used a copying machine and Lent's draft cards, discharge papers, etc., to make out false identity papers in the name of Henry L. Stanley. (R. 162).

Lent went to Springfield, Missouri, where he cashed several of the money orders before being arrested. After his arrest Lent called O'Connor and hold him what had happened. O'Connor fled to Chicago and Michigan City, Indiana. The remaining money orders were returned to Di Pietto. (R. 163).

During the trial of the case, the prosecutor made prejudicial comments and asked prejudicial questions which the court instructed the jury to disregard.

The first instance occurred during the course of the trial when the prosecution elicited from the testimony of the witness Frederick Ackerman that he and the petitioner Mirro had taken an automobile ride along the Tri-State Highway subsequent to the alleged transportation of the money orders, and the petitioner Mirro supposedly pointed out to Ackerman a farm on the left of the road and stated: "That's Jack McGurn's private cemetery. That's is where he used to bury all the guys he hit. That's where Q'Connor ought to get buried." (R. 69)

"Mr. Calihan: Objection.

* * *

"The Court: Objection sustained, and the jury will disregard it.

"Mr. Calihan: I move for a mistrial.

"Mr. Berg: I move for a mistrial.

"The Court: Lie detector tests are not admissible in evidence in this jurisdiction and the jury will disregard the question.

"Mr. Schippers: I apologize, your Honor. I have no further questions." (R. 222)

Again during the cross-examination of the defense witness Kalady who was in the witness quarters with Ackerman and who was cooperating with state and government agents, Mr. McDonnell was examining Kalady as follows:

"Q. Mr. Kalady, as a matter of fact, you fully expect and have been told that you will be a government witness in other cases, haven't you?

"Mr. Betar: I object.

"Mr. Schippers: I object. *Not any more.*

"The Court: The objection is sustained.

"Mr. Calihan: I object to Mr. Schippers' remark and I move for a mistrial on the basis of it.

"The Court: I didn't hear what he said. What did he say?

"Mr. Bailey: Same motion.

"Mr. Calihan: He said 'Not any more.' I move for a mistrial on the basis of that remark.

"Mr. Bailey: Same motion.

"The Court: Overruled. The jury will disregard Mr. Schippers' comment. It has no bearing on this case and you will disregard it completely."

This testimony was objected to, and the Court overruled the motion for mistrial and struck the testimony relating to McGurn and instructed the jury to disregard it. (R. 77). Despite the fact that the Court had stricken this testimony, in closing argument, the prosecution used the word "buried" and raised an objection from all counsel. After the Court ruled in favor of the defendants, he stated in argument to the jury; "The word was 'buried', ladies and gentlemen, they still don't like it. They are still objecting to it." The Court thereupon ordered the jury to disregard the comment of the prosecution. Immediately, however, upon the heels of that admonition,

the prosecutor then stated, "Now, these defendants, these defendants here, who are so shocked about Ackerman's past life again have no qualms about talking about burying someone." (R. 283).

An agent of the FBI had testified on direct examination concerning his conversations with petitioner McDonnell. On cross-examination the petitioner McDonnell had offered to take a "lie-detector" test on his denial of the charges later made by this indictment. On re-direct examination the prosecutor asked, as follows:

> "Q. Oh, were the money orders run for fingerprints through the FBI laboratory in Washington?
>
> "A. They definitely were.
>
> "Q. What were the results?
>
> "A. No latent fingerprints of any value were developed.
>
> "Q. And Mr. McDonnell wasn't given a lie test because they don't mean anything, isn't that right?
>
> "Mr. Schippers: Your Honor, I apologize for the comment." (R. 252) (Emphasis supplied)

The jury began its deliberation at 3:35 P.M. on May 9, 1966. They were taken to sleeping quarters at 10:45 P.M. and resumed deliberations at 8:45 A.M. on May 10, 1966. Later in the morning, the jury communicated with the Judge through the marshal that they were unable to agree upon a verdict. At this time the Court called the jury into court and inquired whether further deliberations would be productive of a verdict. The foreman replied, "Well, we were unable to reach a decision, sir." At this time over the objection of counsel for the petitioners, the Court instructed the jury as follows:

> "Any verdict you reach must be unanimous and in your deliberation you should examine the evidence

submitted with a proper regard and consideration for the opinions of each other. You should listen to each other's arguments with an open mind."

"Now with reference to this instruction that I have just read, I am going to give you this following instruction and send you back for additional deliberation:

"The Court, by repeating this last instruction, does not intend nor mean to convey the impression that the jury must reach a decision in this case. You are at liberty not to do so if, after further discussion, any differences of opinion heretofore expressed cannot conscientiously be reconciled one way or the other."

The Judge then informed counsel and the petitioners that he would be attending the Judicial Conference for the Seventh Circuit and that he intended to keep the jury out until 4:30 P.M. At 4:00 that afternoon the Court resumed to take the verdict. At that time the Court stated:

"I would like the record to show that at appproximately 11:35 the jury sent the following note to the Court:

"'Your Honor: The issue has broken up and discussed and we the jury is still unable to reach a decision. The jury.'

"The deputy marshal, Mr. Joneson, phoned me at the conferences of judges and I directed him to just tell the jury to continue their deliberations. We will file that of record. All right."

There was no evidence introduced nor no hearing held to determine exactly what the deputy marshal had said to the jury when he conveyed the Judge's instructions to them. The Court of Appeals held this procedure not to be error.

REASONS FOR GRANTING THE WRIT

1. The opinion of the Court below in holding that the insertion of the name of a payee and the amount on an otherwise valid money order constitutes a forgery within the meaning of 18 U.S.C. §2314 is in direct conflict with the Court of Appeals for the Eighth Circuit, *Streett* v. *United States,* 321 F.2d 151, and appears to be in conflict with the reasoning of this Court in *Prussian* v. *United States,* 282 U.S. 675.

In *Streett* v. *United States,* 321 F.2d 151, the defendant was indicted under Section 2314 for the interstate transportation of a National City Bank travelers check which he had stolen. The counter-signature of the purchaser was written by the defendant, and he cashed the check. The Court of Appeals reversed the conviction because such a counter-signature is in the nature of an endorsement on the instrument and cannot be "the making" of the instrument itself. In so holding, the Eighth Circuit placed reliance on this Court's decision in *Prussian* v. *United States,* 282 U.S. 675. In *Prussian,* the indictment was for forgery of a government obligation in a forged endorsement situation. In holding that a forging endorsement was not a forgery within the meaning of the statute, this Court held:

> "But to extend the meaning of that phrase [obligation of the United States] so as to embrace the endorsement on the government draft is to enlarge the statutory definition, and would be possible only by a strained construction inadmissible in the interpretation of the criminal statutes, which must be strictly construed." *Prussian* v. *United States,* 282 U.S. 675, 677.

A close analysis of the money orders admitted into evidence herein (App. D, *infra*) will reveal that they are not "falsely made." There is no question that forgery within the meaning of the statute must consist in the false-making of the instrument and not in the making of any false representation thereon. *Martenay* v. *United States*, 216 F.2d 760 (10th Cir. 1954); *Melvin* v. *United States*, 316 F.2d 647 (7th Cir. 1963); *United States* v. *Gallagher*, 94 F.Supp. 640 (W.D. Pa. 1950); *United States* v. *Greever*, 116 F.Supp. 755 (D.C. D.C. 1953); *Wright* v. *United States*, 172 F.2d 310 (10th Cir. 1949); *Greathouse* v. *United States*, 170 F.2d 512 (4th Cir. 1948); *United States* v. *Brown*, 246 F.2d 541 (2d Cir. 1957); *United States* v. *Doran*, 299 F.2d 511 (7th Cir. 1962); *Gilbert* v. *United States*, 370 U.S. 650; *United States* v. *Carabasi*, 292 F.2d 362 (3d Cir. 1961).

The signature of the sender on an American Express Money Order is not comparable to the signature of a maker on a check because there is no reliance by any subsequent holder upon the credit of such a sender. The sender, as sender, assumes no obligations upon the instrument and his name on the face thereof is in the nature of a mere representation rather than the assumption of any obligation; consequently, the falseness of this signature, whether it be that of someone else or of a fictitious, non-existent person, cannot serve to being the case within the statute. A review of the decisions under Section 2314 in cases involving money orders will reenforce this conclusion. In *United States* v. *Nelson*, 273 F.2d 459 (7th Cir. 1963), a case which involved American Express Money Orders, this court wrote an extensive review of law of Federal forgery, concluding that the forged signature of a sub-agent of an American Express Company, ". . . without which the money orders could not have been cashed . . ."

brought the case within the statute. There was evidence in the *Nelson* case that the particular signature of the sub-agent was not on the money orders when they were stolen in blank and was placed thereon by a co-defendant. To the same effect is *United States* v. *Garfinkel,* 285 F.2d 548 (7th Cir. 1961), where the court in ruling on this issue stated:

> "But the name of the authorized sub-agent of American Express Company was forged. . . ." 285 F.2d 548, 551.

Since the decision of each of these cases, the American Express Company has apparently changed its money order form and the instruments involved in the instant case do not require the signature of, or validation by, any authorized sub-agent (App. D, *infra*). There is no place provided on the form for such a signature and American Express Company becomes obligated on the instrument by the signature of the treasurer thereof which is printed on the form. The change in the money order form then has the legal effect of increasing the negotiability of the document.

We note that there has been another more recent change in the form of money orders issued by the American Express Company since 1961, the date of transactions alleged in the indictment. (R. 192-5). The form the company now uses again requires validation by a sub-agent at the time of issuance. (R. 194). In this respect the present form is similar to that involved in *United States* v. *Nelson,* 273 F.2d 459 (7th Cir. 1963). We invite the attention of the court to *Cloud* v. *United States,* 361 F.2d 627 (8th Cir. 1966). The Court of Appeals for the Eighth Circuit, the same circuit in which the *Streett* case arose, affirmed a conviction in a case involving the theft of blank American

Express money orders from a grocery chain. The basis of that decision was the proof in the record in that case that a validating stamp was required to give the instrument currency. The evidence there established that the "AECO" stamp had been forged and that defendant knew that such a forgery of the "required symbol" was necessary to pass the instrument. 361 F.2d 627, 629. There is no such proof in this case. Indeed, the evidence is precisely contrary. (R. 193). The *Cloud* case, then, is entirely consistent with both *Streett* and *Nelson* and embodies the precise theory upon which we ask this court to reverse here.

The same rationale provides the basis of the decisions in two other cases involving Western Union Money Orders. In *Halfen* v. *United States,* 321 F.2d 556 (5th Cir. 1963), the forged signature of an employee of a hotel, which served as issuing agent, brought the case within the statute; and in the second case, *Halfen* v. *United States,* 324 F.2d 52 (10th Cir. 1963), there was a forged countersignature of a Western Union agent. In *United States* v. *Klein,* 340 F.2d 547 (2nd Cir. 1965), the necessary countersignature of a representative of the Bank of America, issuing Agent, was forged. On the other hand, is an earlier case, also denominated *United States* v. *Klein,* but found in 306 F.2d 13 (2d Cir. 1962), where the instruments involved were American Express Travelers Checks the government did not proceed under the portion of the statute involving forged securities but rather the prosecution was based upon the portion of the statute proscribing stolen merchandise of a value of more than five thousand dollars. Consequently, the government in that case avoided the problems presented in *Streett* v. *United States,* 331 F.2d 151 (8th Cir. 1964), the precise problem that the govern-

ment has not avoided in the case at bar. In every case we have found in which a conviction under the portion of the statute here involved has been affirmed, there has been a forgery of the critical portion of the face of the instrument necessary to give the instrument currency and constitute it a viable negotiable instrument. This is not true of the instant case because that critical portion of the face of the instrument was in final form when the money orders were obtained by the defendants. There instruments were not similar to stolen check forms such as were involved in *Stinson* v. *United States,* 316 F.2d 554 (5th Cir. 1963), where the signature of the maker was lacking. These money orders were like checks signed in blank; and once the valid, true signature of the maker was placed thereon and the maker's obligation assumed, there could be no forgery of the instrument or of the security. There could be only fraudulent negotiation and forged endorsements which, we have noted, are not within the statute. As the Supreme Court stated in *Gilbert* v. *United States,* 370 U.S. 650, 658:

> "Of course Congress could broaden the concept of 'Federal' forgery by statutory definition. We hold only that it has only yet done so."

We contend that the basic approach to the determination of whether or not a forgery here occurred must rest upon an analysis related to the reliance placed upon the credit of American Express Company, the maker of the instruments. The addition of secondary obligors can only be by endorsement and any statements or descriptions of the original transactions can only be representations. Endorsements and representatives, however false, do not obligate the American Express Company. That company must be obligated by the signature of its own representative duly authorized to extend its credit. In this case,

while the endorsements and the representations may have been false and the instruments themselves may have been stolen, the credit of the primary obligor, American Express Company, by its own choice was pledged by the signature already on the document.

This analysis accords with the decisions in most of the cases under the statute. *Greathouse* v. *United States,* 170 F.2d 512 (4th Cir. 1948), held that a check returned for insufficient funds, however knowingly drawn, was not a forged security within the statutes. *Wright* v. *United States,* 172 F.2d 310 (10th Cir. 1949), drew the same conclusion on a NSF check drawn on an out-of-state bank. *United States* v. *Greever,* 116 F.Supp. 755 (D.C. 1953) extended this rationale to a fictitious name check, when the individual who used the fictitious name was actually known by that name in some quarters. *United States* v. *Gallagher,* 94 F.Supp. 640 (W.D. Pa. 1950), found no violation in connection with a check on which the bank was real and the name was real and only the account non-existent. *Hubsch* v. *United States,* 256 F.2d 820, (5th Cir. 1958), is another case involving a fictitious name signed as a maker of a check. The Court reversed because it was not clear that the name was relied upon in extending credit on the instrument. In short, if the credit extended on the original obligation has been extended as a result of a false and fraudulent signature of the primary obligor on the instrument, there can be a forgery, otherwise not. The primary obligor on these instruments is the American Express Company. It promised to pay on the instruments by the signature of its treasurer and by its own choice the company required no counter-signature and no further validation at the time of issuance; consequently, there can be no forgery.

The Court below, however, held that the insertion of the name of the payee and the amount on the face of the valid money order constituted forgery. We submit that because of the conflict between the circuits and to resolve this important question in the administration of federal criminal justice that this Court should grant this Writ of Certiorari.

2. As found by the Court of Appeals in its decision (App. A, *infra*), the jury began its deliberation at 3:35 P.M. on May 9, 1966. They were taken to sleeping quarters at 10:45 P.M. and resumed deliberations at 8:45 A.M. on May 10, 1966. Later in the morning, the jury communicated with the Judge through the marshal that they were unable to agree upon a verdict. At this time the Court called the jury into court and inquired whether further deliberations would be productive of a verdict. The foreman replied, "Well, we were unable to reach a decision, sir." At this time over the objection of counsel for the petitioners, the Court for the *second* time instructed the jury as follows:

> "Any verdict you reach must be unanimous and in your deliberation you should examine the evidence submitted with a proper regard and consideration for the opinions of each other. You should listen to each other's arguments with an open mind."
>
> "Now with reference to this instruction that I have just read, I am going to give you this following instruction and send you back for additional deliberation:
>
> "The Court, by repeating this last instruction, does not intend nor mean to convey the impression that the jury must reach a decision in this case. You are at liberty not to do so if, after further discussion, any differences of opinion heretofore expressed cannot conscientiously be reconciled one way or the other." (R. 333)

The Judge then informed counsel and the petitioners that he would be attending the Judicial Conference for the Seventh Circuit and that he intended to keep the jury out until 4:30 P.M. At 4:00 that afternoon the Court resumed to take the verdict after approximately 14 hours of deliberation. At that time the Court stated:

> "I would like the record to show that at approximately 11:35 the jury sent the following note to the Court:
>
> "'Your Honor: The issue has broken up and discussed and we the jury is still unable to reach a decision. The jury.'
>
> "The deputy marshal, Mr. Joneson, phoned me at the conferences of judges and I directed him to just tell the jury to continue their deliberations. We will file that of record. All right." (R. 336)

There was no evidence introduced nor no hearing held to determine exactly what the deputy marshal had said to the jury when he conveyed the Judge's instructions to them. The Court of Appeals held this procedure not to be error.

We submit that this decision of the Court of Appeals is in conflict with *Shields* v. *United States,* 273 U.S. 583. There the Court with no requirement as to prejudice reversed a federal criminal conviction before the trial judge who violated the right of defendant and counsel to be present when the trial judge answered inquiries from the jury. We further submit that the decision of the Court of Appeals is in direct conflict with the decision of the Third Circuit, *Arrington* v. *Robertson,* 114 F. 2d 821; *United States* v. *Neal,* 320 F.2d 533, the Sixth Circuit in *Evans* v. *United States,* 284 F.2d 393 and the Tenth Circuit in *Fina* v. *United States,* 46 F.2d 643. We respectfully sub-

mit since a defendant has a constitutional right to be present during the entire trial that no prejudice need be shown when communications are made to the jury by a third person outside the presence of the court and the petitioners. *United States* v. *Behrens,* 375 U.S. 162. We also submit that under the procedure below, the prosecution did not satisfy its "heavy burden", *Miranda* v. *Arizona,* 384 U.S. 436, that the constitutional rights of these defendants were not violated. This question was presented to this Court in *Grosso* v. *United States,* 390 U.S. 62. However, because of the disposition of other issues in that case, this Court did not rule upon this issue. We submit that this question is now again ripe for review.

3. This case presents the question left unresolved in *Bruton* v. *United States,* 88 S. Ct. 1620, No. 705, October Term, 1967, as to the effect of instructions to disregard repeated prejudicial comments and actions by the prosecutor. In *Bruton,* this Court in overruling *Delli Paoli* v. *United States,* 352 U.S. 232, held that a defendant was prejudiced by the admission of a co-defendant's statement incriminatory of both defendants in spite of careful instruction by the trial court that the jury was to consider the statement only against the person making it. We submit that this case presents an opportunity for the court to enunciate a rule concerning the application of *Bruton* to cases involving repeated prejudicial comments and questions by the prosecution. In *Bruton* this Court stated:

> "Not every admission of inadmissible hearsay or other evidence can be considered to be reversible error unavoidable through limiting instructions; instances occur in almost every trial where inadmissible evidence creeps in, usually inadvertently."

The prejudicial questions and comments by the prosecution in this case did not creep in inadvertently but rather seemed to crash into the case through deliberate design.

The first instance occurred during the course of the trial when the prosecution elicited from the testimony of the witness Frederick Ackerman that he and the petitioner Mirro had taken an automobile ride along the Tri-State Highway subsequent to the alleged transportation of the money orders, and the petitioner Mirro supposedly pointed out to Ackerman a farm on the left of the road and stated: "That's Jack McGurn's private cemetery. That's is where he used to bury all the guys he hit. That's where O'Connor ought to get buried." (R. 69)

This testimony was objected to, and the Court overruled the motion for mistrial and struck the testimony relating to McGurn and instructed the jury to disregard it. (R. 77). Despite the fact that the Court had stricken this testimony, in closing argument, the prosecution used the word "buried" and raised an objection from all counsel. After the Court ruled in favor of the defendants, he stated in argument to the jury; "The word was 'buried', ladies and gentlemen, they still don't like it. They are still objecting to it." The Court thereupon ordered the jury to disregard the comment of the prosecution. Immediately, however, upon the heels of that admonition, the prosecutor then stated, "Now these defendants, these defendants here, who are so shocked about Ackerman's past life again have no qualms about talking about burying someone." (R. 283).

If this were the only instance of improper conduct by the prosecutors it would be bad enough. However, prejudice injected by the prosecution did not stop there. An agent of the FBI had testified on direct examination con-

cerning his conversations with petitioner McDonnell. On cross-examination the petitioner McDonnell had offered to take a "lie detector" test on his denial of the charges later made by this indictment. On re-direct examination the prosecutor asked, as follows:

"Q. Oh, were the money orders run for fingerprints through the FBI laboratory in Washington?

"A. They definitely were.

"Q. What were the results?

"A. No latent fingerprints of any value were developed.

"Q. And Mr. McDonnell wasn't given a lie test because they don't mean anything, isn't that right?

"Mr. Calihan: Objection.

* * *

"The Court: Objection sustained, and the jury will disregard it.

"Mr. Calihan: I move for a mistrial.

"Mr. Berg: I move for a mistrial.

"The Court: Lie detector tests are not admissible in evidence in this jurisdiction, and the jury will disregard the question.

"Mr. Schippers: I apologize, your Honor. I have no further questions." (R. 222)

Again during the cross-examination of the defense witness Kalady who was in the witness quarters with Ackerman and who was cooperating with state and government agents, Mr. McDonnell was examining Kalady as follows:

"Q. Mr. Kalady, as a matter of fact, you fully expect and have been told that you will be a government witness in other cases, haven't you?

"Mr. Betar: I object.

"Mr. Schippers: I object. *Not any more.*

"The Court: The objection is sustained.

"Mr. Calihan: I object to Mr. Schippers' remark and I move for a mistrial on the basis of it.

"The Court: I didn't hear what he said. What did he say?

"Mr. Bailey: Same motion.

"Mr. Calihan: He said 'Not any more.' I move for a mistrial on the basis of that remark.

"Mr. Bailey: Same motion.

"The Court: Overruled. The jury will disregard Mr. Schippers' comment. It has no bearing on this case and you will disregard it completely.

"Mr. Schippers: Your Honor, I apologize for the comment." (R. 252) (Emphasis supplied)

The significance of "not any more" is enormous. Kalady had testified that Ackerman had only recently advised him of the advantages of being a government witness. Kalady testified that under Ackerman's prompting in April, 1966, he had lied to the FBI about being a witness to a murder. Ackerman had previously testified that he was going to start telling the truth beginning in October of 1965 (R. 116, 120). Thus a conflict arose by Kalady's testimony. The disavowal of Kalady as a government witness constituted a highly improper comment by the prosecutor on the credibility of the defense witness — a matter solely within the province of the jury.

The entire case as it related to these petitioners, rested solely upon the testimony of the witness Ackerman. Ackerman had been licensed to practice law in Illinois but had withdrawn his name from the roll of attorneys immediately before he was indicted and was a convicted felon. (R. 34). He admitted that he had not paid income taxes since 1956 or 57 and at the present time owed the government back income taxes in the amount of $400,000 (R. 90). He stated that since he had left law school he had been known by at least five different names (R. 79-80). He had been

involved in a fraudulent scheme to bilk American investors of worthless mines in Canada (R. 83-84), and that even though he had money he failed to make support payments to his wife and seven children which resulted in the loss of their home (R. 88, 225-230). He admitted that he had falsified an application for a Federal Housing Authority loan knowing that it was a federal offense to do such (R. 92). He also admitted that he had been the subject of contempt proceedings in the Probate Court of Cook County (R. 109-110).

Thus, we submit that in a case such as this where the conviction of the petitioners rests upon such a slender reed that the rule of *Bruton* should apply to prejudice engendered in the trial by the United States Attorney. As this Court recognized in *Bruton,* Judge Learned Hand viewed limiting instructions as a "placebo", medically defined as "a medicinal lie." *Bruton* v. *United States,* 88 S. Ct. 1620, fn. 8.

We therefore submit that in view of the matters left open by this Court's decision in *Bruton,* that the Court issue its Writ of Certiorari in order to determine the applicability of the *Bruton* rule to such cases.

CONCLUSION

Wherefore, for the foregoing reasons, Petitioners pray that a Writ of Certiorari be issued to the United States Court of Appeals for the Seventh Circuit, in this case.

Respectfully submitted,

EDWARD J. CALIHAN, JR.
JOHN P. CROWLEY
BAILEY & LE FEVOUR
Attorneys for Petitioners